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IN THE

Supreme Court of the United States

October Term, 1967

No. 1341—~~Misc.~~

EARL C. PEACOCK and FREDERICK L. SWEET,
Petitioners,

vs.

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF NEW YORK, FOURTH JUDICIAL DEPARTMENT.

BRIEF FOR RESPONDENT IN OPPOSITION AND APPENDICES

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ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF NEW YORK, FOURTH JUDICIAL DEPARTMENT.

BRIEF FOR RESPONDENT IN OPPOSITION

Opinions Below

Petitioners' judgment of conviction was affirmed by the Appellate Division, Fourth Department, State Supreme Court, in a memorandum opinion dated January 18th, 1968, and reported at 29 A. D. 2d 735; 287 N. Y. S. 2d 368 (See Appendix "B" herein).

Jurisdiction

Leave to appeal to the New York State Court of Appeals, the highest New York state court in which review may be obtained, was denied by the Hon. Alger A. Williams, Presiding Justice of the Appellate Division, Fourth De-

partment, Supreme Court, in a certificate dated March 18th, 1968, reproduced herein as Appendix "A". Respondent received petitioners' petition for a writ of certiorari on April 11th, 1968. Jurisdiction is sought pursuant under Title 28 of the United States Code, Section 1257, Subdivision 3.

Questions Presented

1. Do the Fifth and Fourteenth Amendments to the United States Constitution prohibit a conviction for perjury committed in the course of testimony compelled under an involuntary waiver of immunity?

2. Do the Fifth and Fourteenth Amendments require, in a case involving perjury before a grand jury, a preliminary hearing, independent of the trier of fact on the question of guilt, to determine the voluntary or involuntary character of the alleged perjurious grand jury testimony?

Statement

The petitioners were originally indicted by an Erie County Court Grand Jury on November 2nd, 1964, under a nine-count indictment charging Burglary, Attempted Grand Larceny, Conspiracy, Omission of Duty as a Public Officer and Perjury. Count one charging Conspiracy, count four charging Perjury in the First Degree, count eight charging Perjury in the First Degree and count nine Omission of Duty as a Public Officer were dismissed by the court prior to the submission of the case to the jury. The jury acquitted the defendants on counts two, three and seven charging Burglary in the Third Degree, Attempted Grand Larceny in the First Degree and Perjury in the First Degree, respectively. The jury convicted

the petitioners on the remaining two counts—counts five and six—charging two separate crimes of Perjury in the First Degree, committed by the petitioners before a session of the grand jury before which they testified. On January 12th, 1967, each petitioner was sentenced to a term of not less than one nor more than three years in Attica State Prison on each count, sentences to run concurrently.

On that date, timely notices of appeal were filed on behalf of each petitioner to the Appellate Division, Fourth Department, and certificates of reasonable doubt were granted by the Hon. Burke I. Burke, Erie County Judge, who presided at the trial, which allowed petitioners to be released on $5,000.00 property bond pending the determination of the appeal. The case was subsequently argued before the Appellate Division, Fourth Department and, thereafter, on January 18th, 1968, the judgment of conviction appealed from was unanimously affirmed in all respects upon a memorandum opinion reproduced herein as Appendix "B" and "C". The petitioners thereafter applied for leave to appeal to the state court of appeals before the Hon. Alger A. Williams, Presiding Justice of the Appellate Division, who, on March 18th, 1968, denied leave to appeal in a certificate reproduced as Appendix "A" herein. On March 19th, 1968, Justice Williams granted a stay of execution of the judgment of conviction pending application for certiorari to this court and continued petitioners on bail under the previously granted $5,000.00 property bond.

Petitioners' conviction arose out of the following events. On June 3rd, 1964, at approximately 10:00 p. m. the Buffalo Police were called to investigate a burglary then allegedly in progess at 860 Hertel Avenue in the City of Buffalo. The address is the business address of the Huber-

Lanchott Lumber Company. Two women who resided next to the premises in question testified that they saw two men dressed in what looked like police uniforms running from the north side of Hertel Avenue in the vicinity of the lumber company into a parking lot on the south side of Hertel Avenue. A short time thereafter, various police cars arrived on the scene pursuant to a police radio call. One detail of policemen arriving came upon the defendants in their police vehicle and were told by the petitioner Peacock that he and the petitioner Sweet had chased an unlighted car into the parking lot but that they lost sight of the car. An Erie County Grand Jury investigated the burglary and the circumstances surrounding it. Petitioners were not subponaed to appear before the Grand Jury. As police officers, their appearance was requested through the Police Department. But petitioner Sweet requested to appear before the Grand Jury upon advice of counsel (Record 1555 through 1557).

Both petitioners were fully advised of their rights under the Fifth Amendment to remain silent and their right to an attorney and were, in addition, advised pursuant to Article 1, Section 6 of the New York Constitution requiring the removal from office of any official who refused to waive immunity before a grand jury. Petitioners signed waivers of immunity and testified under oath. During the course of their testimony, the grand jury believed that the two petitioners lied when they stated that they had received a radio call at 10:05 p. m. concerning the burglary and then drove west on Hertel Avenue in the squad car, turning left into the parking lot across the street from the scene of the burglary (count five) and that the defendants lied in stating that they pursued a large, dark car into the parking lot (count six). The grand jury testimony of both peti-

tioners, Peacock (People's Exhibit No. 6, Record 1338) and Sweet (People's Exhibits 107, 108, Record 1555) were read to the trial jury over objection of the defendants (Peacock, Record 1215; Sweet, Record 1223).

Throughout these proceedings upon the appeal and application for certiorari herein, the petitioner Peacock has been represented by Charles J. McDonough, Esq., and the petitioner Sweet by Edward K. O'Shea, Esq. The People have been represented throughout by the Hon. Michael F. Dillon, District Attorney of Erie County.

REASONS FOR OPPOSING THE WRIT

POINT ONE

A person who testifies with or without immunity from prosecution is not protected by the Fifth or Fourteenth Amendments from the charge of perjury committed in the course of sworn testimony.

Respondent cannot disagree with the statement in petitioners' petition that this court has not yet determined whether, following *Garrity vs. New Jersey*, 385 U. S. 493, a person who is invalidly compelled to testify before a grand jury is protected not only against charges for crimes to which he admits in the course of the proceeding but also actual perjury then committed in the presence of a grand jury. Similarly, Respondent cannot disagree that this is an important question under the Federal Constitution. However, Respondent maintains the answer to this question must be that a person is not permitted to commit perjury even though he would be otherwise protected against conviction for past crimes concerning which he gives incriminating testimony and that this conclusion can be drawn

from the reading of *Garrity vs. New Jersey, supra,* and *Glickstein vs. United States,* 222 U. S. 139.

Respondent would agree that had the petitioners been convicted of the other substantive crimes charged in the indictment, namely burglary and attempted grand larceny, the *Garrity* decision would require a reversal of those convictions since it appears clear that the waiver of immunity executed by the petitioners was invalid as a product of coercion under the *Garrity* rule. But it does not follow that *Garrity* would similarly invalidate a conviction for perjury committed in the course of any testimony that would be otherwise inadmissible to convict a defendant of past crimes. Although the testimony given by the petitioners is, under *Garrity,* undoubtedly the product of coercion, the perjury committed by petitioners is not in the nature of testimony as protected by the Fifth Amendment. It is a criminal act committed in the presence of the Grand Jury. The fact that the waiver of immunity is the product of coercion does not mean that a witness is similarly coerced into lying. As was said by Chief Judge Fuld in *People vs. Tomasello,* 21 N. Y. 2d 143 at 150; 287 N. Y. S. 2d at 6: "In other words, the protection against prosecution, whether under a statute or in consequence of a violation of the constitutional privilege, extends only to prosecution for past crimes and not to perjury committed in the very process of making the disclosure assertedly compelled. As Wigmore put it in his work on Evidence (McNaughton rev. ed., 1961, Vol. VIII, § 2282, p. 512):

> "* * * If argument were needed, it would be sufficient merely to appeal to the terms of the privilege, which forbids that one be compelled to give evidence against himself—for the perjured utterance is not "evidence" or "testimony" to a crime but is the very act of crime itself; the compulsion is not to testify falsely but to

> testify truly; and the privilege by hypothesis would have been violated only if the witness had truly given self-incriminating evidence, but if he falsely exonerates himself he had confessed no fact "against himself", hence his privilege has not been infringed by the actual answer even though it might have been by some other answer.' "

It is submitted that, for this reason, the federal courts have consistently held that the Fifth Amendment does not provide immunity from giving, voluntary or under compulsion, false testimony, unless the compulsion requires the giving of statements which are false. *Moyer vs. Brownell,* 137 F. Supp. 594. See also *Glickstein vs. United States,* 222 U. S. 139 at 142; *Clairborne vs. United States,* 77 F. 2d 682; *United States vs. Parker,* 244 F. 2d 943, cert. den. 355 U. S. 836; *United States vs. Ponti,* 257 F. Supp. 925.

If *Garrity, supra,* has the effect of extending immunity to these petitioners for past crimes committed, based on their testimony before the grand jury, it would seem to follow that they are in the position of a defendant who, having been given immunity, thereafter lies under oath. In *Glickstein vs. United States, supra,* it was clearly stated, 222 U. S. at 142 that:

> "* * * The immunity afforded by the Constitutional guarantee relates to the past, and does not endow the person who testifies with a license to commit perjury."

Under *Garrity vs. New Jersey, supra,* and *Glickstein vs. United States, supra,* the petitioners were effectively and automatically placed in the position of having immunity from prosecution for substantive crimes to which their testimony related. Petitioners were therefore in the position of having immunity and therefore the rule in the

Glickstein case, *supra*, would apply. Again, as Chief Judge Fuld stated in *People vs. Tomasello, supra:*

> "* * * It would, certainly, be highly unrealistic to afford an individual an automatic protection from prosecution for substantive crimes based on his testimony and at the same time to immunize him from a charge of perjury if, in giving that testimony, he knowingly and wilfully lies." 21 N. Y. 2d 143 at 149, 287 N. Y. S. 2d at 5.

POINT TWO

The Fourteenth Amendment does not require a preliminary hearing to determine the voluntariness of alleged perjurious testimony on a perjury indictment.

The preliminary hearing mandated by *Jackson vs. Denno*, 378 U. S. 368 is for the purpose of first determining out of the presence of the trier of guilt the voluntary character of the admission or confession. As explained under Point One, *supra*, the grand jury testimony introduced against the petitioners on the perjury charge was not in the nature of a confession or admission, but was rather the evidence of the crime itself. Therefore, the requirements of the Fourteenth Amendment as construed in *Jackson vs. Denno, supra*, do not require any separate hearing on the voluntary nature of the perjurious statements before the grand jury.

CONCLUSION

The writ of certiorari applied for should be denied.

Respectfully submitted,

MICHAEL F. DILLON,
District Attorney of Erie County,
Attorney for Respondent,
200 Erie County Hall,
25 Delaware Avenue,
Buffalo, New York 14202.

LESLIE G. FOSCHIO,
Assistant District Attorney,
Of Counsel.

May 15th, 1968.

APPENDICES

APPENDIX "A"

Appellate Division Certificate Denying Leave to Appeal to the New York State Court of Appeals

STATE OF NEW YORK

SUPREME COURT

APPELLATE DIVISION—FOURTH DEPARTMENT

—o—

THE PEOPLE OF THE STATE OF NEW YORK,
Plaintiff-Respondent,

vs.

EARL C. PEACOCK, JR., FREDERICK L. SWEET,
Defendants-Appellants.

—o—

I, Alger A. Williams, Presiding Justice of the Supreme Court, Appellate Division, Fourth Department, do hereby certify that, upon application timely made by the above named appellants for a certificate pursuant to § 520 of the Code of Criminal Procedure, and upon the record and proceedings herein, there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied from a judgment of the Appellate Division, Fourth Department, unanimously affirming a judgment of conviction of the County Court, Erie County, rendered on January 12th, 1967, convicting defendants of two counts of Perjury in the First Degree.

/s/ ALGER A. WILLIAMS,
Presiding Justice.

Dated: Buffalo, New York, March 18, 1968.

APPENDIX "B"

Appellate Division Amended Order of Affirmance, Earl C. Peacock, Jr.

Motion #643/1967

At a term of the Appellate Division of the Supreme Court of the State of New York, in and for the Fourth Judicial Department, at the City of Rochester, N. Y., commencing on the 25th day of March, 1968.

Present: Hon. Earle C. Bastow,

Justice Presiding,

" Harry D. Goldman,
" Frederic T. Henry,
" Frank Del Vecchio,
" John S. Marsh,

Associate Justices.

PEOPLE OF THE STATE OF NEW YORK,

Respondent,

vs.

EARL C. PEACOCK, JR.,

Appellant.

A motion having been made on the part of the appellant for an order amending the order of this Court entered January 18, 1968, affirming a judgment of conviction of the Erie County Court,

Now, upon reading and filing the affidavit of Edward K. O'Shea, individually and as co-counsel with Charles J.

McDonough, sworn to the 19th day of March, 1968, the notice of said motion together with proof of service upon the attorney for the respondent, and due deliberation having been had thereon,

It is hereby ORDERED, That said motion be, and the same hereby is granted, and the order heretofore entered January 18, 1968 is hereby amended by adding thereto the following: Upon the appeal herein, there were presented and necessarily passed upon questions under the Constitution of the United States, *viz.*: Defendant contended that he was compelled in a criminal case to be a witness against himself before a Grand Jury of Erie County in violation of his rights under the Fifth Amendment to the United States Constitution; and that his rights guaranteed under the Fourteenth Amendment to the United States Constitution were similarly violated by said alleged compulsion. The Appellate Division, Fourth Department, in affirming the judgment of conviction (29 A. D. 2d 735), necessarily held that there was no denial of any constitutional right of defendant.

Enter.

LESTER A. FANNING.

Entered: March 28, 1968.
Lester A. Fanning,
Clerk.

Appellate Division Memorandum Opinion, Earl C. Peacock, Jr.

643. (Erie Co.)—People of the State of New York, Respondent, v. Earl C. Peacock, Jr., Appellant—Judgment unanimously affirmed. See People vs. Goldman, 20 N. Y. 2d__, decided December 28, 1967. (Appeal from Judg-

ment of Erie County Court, Burke, J., convicting defendant of Perjury, 1st degree). Present: Bastow, J.P., Goldman, Henry, Del Vecchio, and Marsh, JJ.

APPENDIX "C"

Appellate Division Amended Order of Affirmance, Frederick L. Sweet

644/1967

At a term of the Appellate Division of the Supreme Court of the State of New York in and for the Fourth Judicial Department, at the City of Rochester, N. Y., commencing on the 25th day of March, 1968.

Present: Hon. Earle C. Bastow,
Justice Presiding,

" Harry D. Goldman,
" Frederic T. Henry,
" Frank Del Vecchio,
" John S. Marsh,
Associate Justices.

PEOPLE OF THE STATE OF NEW YORK,
Respondent,

vs.

FREDERICK L. SWEET,
Appellant.

A motion having been made on the part of the appellant for an order amending the order of this Court entered

January 18, 1968 affirming a judgment of conviction of the Erie County Court,

Now, upon reading and filing the affidavit of Edward K. O'Shea, individually and as co-counsel with Charles J. McDonough, sworn to on the 19th of March, 1968, the notice of said motion together with proof of service upon the attorney for the respondent, and due deliberation having been had hereon,

It is hereby ORDERED, That said motion be, and the same hereby is granted, and the order heretofore entered January 18, 1968 is hereby amended by adding thereto the following: Upon the appeal herein, there were presented and necessarily passed upon questions under the Constitution of the United States, *viz.:* Defendant contended that he was compelled in a criminal case to be a witness against himself before a Grand Jury of Erie County in violation of his rights under the Fifth Amendment to the United States Constitution; and that his rights guaranteed under the Fourteenth Amendment to the United States Constitution were similarly violated by said alleged compulsion. The Appellate Division, Fourth Department, in affirming the judgment of conviction (29 A. D. 2d 735), necessarily held that there was no denial of any Constitutional right of defendant.

Enter.

LESTER A. FANNING,
Clerk.

Entered: March 28, 1968.

Appellate Division Memorandum Opinion,
Frederick L. Sweet

644. (Erie Co.)—People of the State of New York, Respondent, v. Frederick L. Sweet, Appellant.—Judgment unanimously affirmed. See People vs. Goldman, 20 N. Y. 2d ____, decided December 28, 1967; People vs. Tomasello, 20 N. Y. 2d ____, decided December 28, 1967. (Appeal from Judgment of Erie County Court, Burke, J., convicting defendant of Perjury, 1st degree.) Present: Bastow, J.P., Goldman, Henry, Del Vecchio, and Marsh, JJ.

APPENDIX "D"

New York State Penal Law, Sec. 1620:

"§ 1620. Perjury defined.

A person is guilty of perjury who 1. Swears or affirms that he will truly testify, declare, depose or certify, or that any testimony, declaration, depositions, certificate, affidavit, or other writing by him subscribed is true, in, or in connection with any action or special proceeding, hearing, or inquiry, or on any occasion in which an oath is required by law or is necessary for the prosecution or defense of a private right or for the ends of public justice or may lawfully be administered, and who in such action or proceeding or on such hearing, inquiry or other occasion wilfully and knowingly testifies, declares, deposes or certifies falsely, or states in his testimony, declaration, deposition, affidavit or certificate any matter to be true which he knows to be false;" * * *

New York State Penal Law, Sec. 1620-a:

"Sec. 1620-a. Perjury in the first degree.

A person is guilty of perjury in the first degree who commits perjury as to any material matter in or in connection with any action or special proceeding, civil

or criminal, or any hearing or inquiry involving the ends of public justice or on an occasion in which an oath or affirmation is required or may lawfully be administered."

APPENDIX "E"

Constitution of the United States, Amendment V:

"No person * * * shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law; * * *"

Constitution of the United States, Amendment XIV, Sec. 1:

"* * * nor shall any State deprive any person of life, liberty or property without due process of law * * *"

New York Sate Constitution, Article I, Sec. 6:

"No person * * * shall * * * be compelled in any criminal case to be a witness against himself, providing, that any public officer who, upon being called before a grand jury to testify concerning the conduct of his present office or of any public office held by him within five years prior to such grand jury call to testify, or the performance of his official duties in any such present or prior offices, refuses to sign a waiver of immunity against subsequent criminal prosecution or to answer any relevant question concerning such matters before such grand jury, shall by virtue of such refusal, be disqualified from holding any other public office or public employment for a period of five years from the date of such refusal to sign a wavier of immunity against subsequent prosecution, or to answer any relevant question concerning such matters before such grand jury, and shall be removed from his present office by the appropriate authority or shall forfeit his present office at the suit of the attorney-general.

The power of grand juries to inquire into the wilful misconduct in office of public officers, and to find indictments or to direct the filing of informations in connection with such inquiries, shall never be suspended or impaired by law.

No person shall be deprived of life, liberty or property without due process of law."